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No. 99-1814

IN THE

Supreme Court of the United States

COMMITTEE FOR ENVIRONMENTALLY SOUND DEVELOPMENT, INC., *et al.*,

Petitioners,

v.

THE CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS THE METROPOLITAN TRANSPORTATION AUTHORITY AND THE TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY

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PARTIES TO THE PROCEEDING

The Metropolitan Transportation Authority ("MTA"), incorrectly identified in this action as The Metropolitan Transportation *Agency*, is a public authority organized pursuant to the Public Authorities Law of the State of New York. N.Y. Pub. Auth. Law § 1260 *et seq.* (McKinney 1997). The Triborough Bridge and Tunnel Authority ("TBTA"), an affiliate of the MTA, is organized pursuant to Public Authorities Law § 550. N.Y. Pub. Auth. Law § 550 *et seq.* (McKinney 1997). As public authorities, MTA and TBTA do not have parent corporations and do not issue stock.

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STATEMENT OF THE CASE

Respondents MTA and TBTA (together, the "Authority Respondents") submit this brief in opposition to the Petition for A Writ of Certiorari (the "Petition"). Petitioners seek to overturn the judgment of the United States Court of Appeals for the Second Circuit affirming the United States District Court for the Southern District of New York's decision denying petitioners' motion for leave to file a proposed amended complaint in this action (the "Decision"). The proposed amended complaint, the fourth federal complaint offered by petitioners' thus far in this controversy regarding the sale of the New York Coliseum Site ("Site" or "Coliseum")[1], alleges that respondents violated the Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq.*, and the New York City Uniform Land Use Review Procedure ("ULURP"), New York City Charter § 197-c.

A. The Clean Air Act

The Clean Air Act establishes a well balanced system of regulation in which the federal government, the states, individual citizens and the courts each have distinct, clearly defined roles. First, the United States Environmental

1. On November 12, 1998, 14 months after commencing their action in the District Court, petitioners filed a companion proceeding in New York State Supreme Court, also seeking to enjoin the sale of the Coliseum on, among other bases, New York State's Environmental Quality Review Act ("SEQRA"), ECL § 8-0101. That proceeding was dismissed by order dated July 20, 1999, and the dismissal was affirmed by the New York State Supreme Court, Appellate Division, First Department on January 11, 2000. By order dated April 6, 2000, the New York Court of Appeals denied petitioners' request for leave to appeal.

Protection Agency ("EPA") adopts "national ambient air quality standards" ("NAAQS") to be met in order to keep air quality at healthful levels. *See* 42 U.S.C. § 7409(b). Next, the states must develop the strategies to achieve and maintain the NAAQS. *See* 42 U.S.C. § 7410. These state-developed strategies, which include both regulatory programs and commitments for state and local action, are incorporated into State Implementation Plans ("SIP"). Once developed by the states, SIPs are submitted for EPA's approval. SIP commitments become federally enforceable under the CAA only after EPA's approval is granted. *See* 42 U.S.C. § 7604(a)(1) and (f)(4).

As part of its CAA responsibilities, EPA designates geographic areas that have not met the NAAQS for a particular pollutant as "nonattainment" for that pollutant. Once a particular area meets the NAAQS for a particular pollutant, a state may request EPA to redesignate that area as in "attainment." *See* 42 U.S.C. § 7407(d)(3)(D). Before EPA may approve the redesignation request, EPA must approve a maintenance plan, simultaneously submitted by the state with its redesignation request, that assures the area will remain in attainment. *See* 42 U.S.C. § 7407(d)(3)(E)(iv).

Section 304(a)(1) of the CAA, 42 U.S.C. § 7604(a)(1), authorizes citizens to bring suit only for alleged violations of "an emission standard or limitation" that is in effect under the CAA or under an approved SIP. *See* 42 U.S.C. §§ 7604(a)(1) and (f). Significant for present purposes, an "emission standard or limitation" contained in a SIP becomes effective only after its approval by the Administrator of EPA. *See* 42 U.S.C. § 7604(f)(4); *see also* 40 C.F.R. § 52.02(b).

B. The New York State SIP

Currently, New York City is designated as "nonattainment" for carbon monoxide ("CO"). In an effort to achieve the CO NAAQS, New York State submitted a SIP to EPA in 1984 that was approved in 1985 (the "1984 SIP"). *See* 40 C.F.R. § 52.1673(a). In 1992, the New York SIP was amended in various respects and was approved by EPA on July 25, 1996. *See* 61 Fed. Reg. 38594. The 1992 SIP, section 4.4, provides in part:

> The State and City commit to develop a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard. . . . This new procedure will become part of the CO maintenance plan which must be submitted at the time that the state requests redesignation of the nonattainment area as an area which has attained the NAAQS for CO.

In August 1999, the New York State Department of Environmental Conservation ("DEC") submitted to EPA a Proposed Carbon Monoxide Redesignation Request and Maintenance Plan for the New York Metropolitan Area ("Proposed Redesignation Request"). In accordance with the 1992 SIP, the Maintenance Plan included a new procedure for identifying potential areas at risk of exceeding the CO standard. To date, the EPA has not acted on the Proposed Redesignation Request or CO Maintenance Plan. Thus, the CO Maintenance Plan is not as yet effective, and will not become part of the New York SIP until it is approved by EPA. *See* 42 U.S.C. § 7505a(c) and 42 U.S.C. §§ 7407 (d)(3)(D) and (E).

REASONS FOR DENYING THE PETITION

I.

THE COURT SHOULD DENY THE PETITION BECAUSE THE PROPOSED AMENDED COMPLAINT FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED

Petitioners' request that the Court grant the Petition is predicated on its assertion that the Court of Appeals, in affirming the District Court's denial of the motion for leave to file the proposed amended complaint, ignored an "intervening change in the underlying facts and law" that supplied a basis for the proposed fourth claim for relief. Petition at 12. As described below, petitioners' assertion, correctly rejected by the Court of Appeals, is based on a misreading of the 1992 SIP and a misunderstanding of the process pursuant to which SIP submissions become enforceable under the CAA's citizen suit provisions.

The proposed amended complaint's fourth claim alleged that respondents violated SIP section 4.4 by failing to "develop a broader alternative procedure to identify potential areas at risk of exceedance of the CO Standard." Joint Appendix ("JA") at A-162. As the Court of Appeals correctly explained, however, section 4.4. requires that the City and State develop and submit a "broader procedure" for identifying areas at risk of CO exceedance at the time the state submits its redesignation request to EPA, an event which had not yet occurred at the time petitioners moved to interpose the proposed fourth claim. *See* Petition at A.6a. Because the claim was premature, the Court of Appeals held it was properly dismissed by the District Court.

In August 1999, DEC, in accordance with its obligations under section 4.4, submitted to EPA a Proposed Carbon Monoxide Redesignation Request and Maintenance Plan for the New York Metropolitan Area. Petitioners contend here, as they did at oral argument before the Court of Appeals and in their subsequent petition for panel rehearing, that the August 1999 submission " 'triggered' the broader procedure for evaluation of potential hot spots." Petition at 5; *see also* Petition at 6, 11, 12. Hence, petitioners argue that the proposed fourth claim is ripe for review. Petitioners' contention is simply wrong.

The 1992 SIP only obligated the State and City to "develop" the broader procedure. Nowhere does the 1992 SIP state, as petitioners contend, that the mere *filing* of the Redesignation Request triggers the obligation to implement the broader review procedure for projects such as the redevelopment of the Coliseum. Nor could it. As petitioners concede, this future obligation to conduct a broader review does not ripen into an enforceable "emission standard or limitation" under sections 7604(a)(1) and (f)(3) until the Redesignation Request, including the Maintenance Plan, is approved by EPA as part of the SIP. *See* Petition at 11; 42 U.S.C. § 7407 (d)(3)(D) and § 7604(f)(4); *see also* 40 C.F.R. § 52.02(b).

New York's August 1999 submission, however, has not received the requisite EPA approval.[2] Until that happens, the

2. Apart from its other defects, petitioners' argument is an improper attempt to alter the proposed fourth claim. Petitioners alleged in the proposed amended complaint that "Defendants violated two specific strategies set forth in . . . the SIP [including] Section 4.4 [which] commits the City to *develop* a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard." JA at A-162 (emphasis added). The record

(Cont'd)

obligations contained in the Maintenance Plan for the New York Metropolitan Area are *proposals* for EPA review, not "standards or limitations" enforceable under the CAA. Accordingly, the Court of Appeals correctly determined that presently, the City and State are under no federal, or, for that matter, state obligation to implement the proposed broader procedure.[3]

In sum, Petitioners' proposed fourth claim has no basis in the 1992 SIP, and, to the extent it is premised upon a commitment contained in the 1999 CO Maintenance Plan submission, the proposed claim remains premature.[4] For these reasons, the Court of Appeals' denial of the petition for panel rehearing was proper in all respects and does not merit this Court's review.

(Cont'd)
demonstrates that this claim is meritless because New York City and New York State have, in fact, developed this alternative procedure. *See* Respondents' Lodging Appendix ("RA") at 20 and Appendix D (submitted to the Court of Appeals pursuant to Federal Rule of Appellate Procedure 28(j)). Petitioners now attempt to change the proposed fourth claim's substance by arguing that respondents have violated the SIP by failing to *implement* the broader procedure with respect to the Coliseum redevelopment. This new claim, nowhere alleged in the proposed amended complaint nor adjudicated below, is not a proper basis for the Petition. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (citing *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)).

3. However, air quality related impacts of the project were studied in a full Environmental Impact Statement pursuant to SEQRA, ECL § 8-0109, as required by section 4.4 of the 1992 SIP.

4. The Court of Appeals expressed "no view on whether that [premature] claim may be brought at some later date." Petition at A.6a.

II.

THE COURT SHOULD DENY THE PETITION BECAUSE THE PETITION DOES NOT RAISE ANY ISSUE THAT MERITS THIS COURT'S REVIEW

Even if the proposed fourth claim were ripe for review, which, as explained in Point I, it is not, the petition should be denied because no arguments are raised that merit this Court's review. Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Among the factors considered by the Court in the disposition of such petitions is that a "United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). A petition for writ of certiorari is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Applying these standards, it is apparent that the Petition should be denied.

Petitioners advance three arguments in support of their request that the Court grant the Petition, each of which is unavailing. First, they assert that, in dismissing the proposed fourth claim, the Court of Appeals violated this Court's "directive regarding liberal pleading and reluctance to dismiss complaints." Petition at 10. Even if true, such a claim does not merit this Court's review because it is merely a disagreement with the Court of Appeals' application of an uncontroverted and uncontroversial principle of law to a particular set of facts. A narrowly circumscribed issue of this sort, lacking significance beyond this case's factual context, does not merit this Court's review.

Second, petitioners allege that although the Court of Appeals recited correctly that it must review *de novo* the District Court's dismissal of the proposed amended complaint, it failed to apply that standard in reviewing the adequacy of the proposed fourth claim. *See id.* Assuming *arguendo* that petitioners are correct, their argument is nothing more than a claim that the Court of Appeals misapplied a properly stated rule of law. Under these circumstances, this Court's review is unwarranted. *See* Supreme Court Rule 10.[5]

Third, petitioners argue that the Court should grant the Petition because the Court of Appeals improperly concluded that section 4.4 of the SIP does not presently provide a valid basis for a CAA citizen suit. *See* Petition at 13. Even if true (which, as demonstrated in Point I, it is not), this argument involves the interpretation of a single provision of a single state's SIP that applies exclusively to development projects in New York City. As such, it does not present an issue of wide applicability with significance beyond this case's narrow context. This fact-specific issue is of limited import and does not merit this Court's review. *See* Supreme Court Rule 10; *see also Watt v. Alaska*, 451 U.S. 259, 276 n.5 (1981) (Stevens, J., concurring) ("our certiorari jurisdiction is designed to serve purposes broader than the correction of error").

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5. Moreover, there is no basis in the Court of Appeals' opinion for petitioners' assertion that the Court of Appeals failed to review the proposed fourth claim *de novo*. Petitioners point to the Court's dismissal of the proposed amended complaint for " 'substantially the same reasons stated in the [district court] opinion . . .' " Petition at 12 (quoting A.6a). However, simply because the Court of Appeals agreed with the District Court's reasoning does not mean that the Court of Appeals failed to assess the adequacy of the petitioners' claims *de novo*.

CONCLUSION

The Court should deny the Petition because, as the Court of Appeals correctly determined, the proposed amended complaint fails to state a claim on which relief may be granted, and the issues raised in the Petition otherwise do not merit this Court's review.

Respectfully submitted,

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